89-305

No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SHERYL MCGUIRE, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF MIKE MCGUIRE, A MINOR, PETITIONERS

v.

THE CITY OF WOODWARD, OKLAHOMA, A MUNICIPAL CORPORATION; CLIFFORD HUNTER; JOSE SANCHEZ; DAVID CARRIGER; BRUCE STORM, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the characterization by the court below of a man who identified the Appellants to an Appellee officer as "upset and frightened" is supported by the record or is based upon hearsay.

2. Whether the seizure and search of the Appellants was justified in light of the particular circumstances.

3. Whether the circumstances presented in the present matter gave any reason to suspect that the Appellants had committed, were committing, or were going to commit a crime and, therefore, if the decision below is in conflict with this Court's ruling in Adams v. Williams, 407 U.S. 143 (1972).

4. Whether the circumstances presented in this matter showed that the Appellants were presenting any danger to the Appellee officers.

5. Whether the Appellants were arrested, as determined by Oklahoma Law, or were permissibly detained, as determined by the Tenth Circuit Court of Appeals.

6. Whether the seizure and search of the Appellants, at gun point, was an arrest or a Terry stop, and, therefore, whether the decision below is in conflict with this County ruling in Terry v. Ohio, 392 U.S. 1 (1968).

7. Whether the Appellants civil rights were violated by the actions of the Appellees.

8. Whether the decision of the court below is in conflict with established Oklahoma substantive law concerning arrests.

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THE CITY OF WOODWARD, OKLAHOMA, A MUNICIPAL CORPORATION; CLIFFORD HUNTER; JOSE SANCHEZ; DAVID CARRIGER; BRUCE STORM, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Sheryl McGuire, individually and as Mother and Next Friend of Mike McGuire, a minor, hereby Petition this honorable Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the court of appeals (App. A, infra, 1A-1J) is not reported. The Opinion of the district court (App. B, infra, 2A-2W) is not reported.

JURISDICTION

The Judgment of the court of appeals (App.A, infra, 1A-1J) was entered on May 4, 1989. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . "

3. The Fourteenth Amendment to the United States Constitution provides in

relevant part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Title 42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

STATEMENT

The basis for federal jurisdiction in the court of first instance was Title 42 U.S.C. §1983 as well as the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

On July 19, 1985 the Petitioners were in Woodward, Oklahoma for the purpose of shopping. Sheryl McGuire parked her auto-

mobile in the parking lot of the Anthony's store in Woodward, Oklahoma. Mrs. McGuire and her son, Mike McGuire, went into a store located adjacent to the parking lot, from which Mr. McGuire returned to the vehicle prior to his mother. Mrs. McGuire later returned to the vehicle and both she and her son departed from the parking lot without incident.

While the McGuires were transacting their shopping, an employee of Anthony's, Mr. Tom McDonald, telephoned the Woodward Police Department and advised the police dispatcher that there was a man in front of his store with a gun.

The Woodward police dispiatcher, Officer Charles D. Baker, dispatched a message to Officer Carriger advising that he had received a call concerning a man with a gun in the Anthony's parking lot. Officer Carriger proceeded to the Anthony's parking lot where he was advised by a man wearing a tie,

whose identity was later developed as Mr. Tom McDonald, that the tan car exiting the parking lot, onto a state highway which runs through Woodward, Oklahoma, was the car carrying the man who purportedly had the gun.

Officer Carriger took no further steps to make inquiry of the facts surrounding the telephone call to the Police Department, nor did he, or any other police officer, take any steps to make further inquiry as to whether or not any crime had, in fact, been committed. Officer Carriger immediately re-entered his vehicle and gave chase to the McGuires.

The McGuire vehicle was later stopped by the convergence of three (3) Woodward patrol cars. In addition to Officer Carriger's car, there were police units occupied and driven by Officers Hunter and Sanchez.

Upon stopping the McGuire vehicle, the McGuires were ordered from their car,

via public address system, at gunpoint, and ordered to lay spread eagle on the hot asphalt surface of the roadway. The McGuires were stopped at a point in a business district in the City of Woodward, Oklahoma. The McGuires were then searched, while in the spread eagle position, and then brought to their feet. Mr. McGuire was further physically constrained by Officer Carriger while Officer Sanchez looked into the vehicle, for the first time, and found a BB pistol laying on the front seat. Officer Sanchez then reached into the automobile, seized the BB pistol, and Mr. McGuire was released from the physical restraint imposed upon him by Officer Carriger.

At no time during the ordeal were the Petitioners ever apprised as to the reason for the treatment that they had received.

The court of first instance sustained

a Motion for Summary Judgment of all Respondents finding that no violation of civil rights had occurred and even had such violation occurred, that the Defendants were entitled to qualified immunity pursuant to Anderson v. Creighton, 107 S.Ct. 3034 (1987). Petitioners appealed said decision to the Tenth Circuit Court of Appeals which entered an Order and Judgment concluding that no constitutional violation occurred and opting to refrain from addressing the issues of qualified immunity or municipal and supervisory liability.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the manner and procedures of police officers in attempting to perform a Terry investigation. Further, this case presents a conflict in the law of the State of Oklahoma, as concerns arrests, with the standards imposed and recognized by the Tenth Circuit Court of Appeals. Also,

this case presents a deviation from this Court's prior holdings concerning limited investigations in that the Tenth Circuit Court of Appeals has now allowed a much broader area of activity to constitute a Terry investigation than has previously been allowed by this Court. The court of appeals has held that police officers may, without any information or belief that persons have committed a crime, stop persons at gunpoint, and attribute these activities to a reasonable Terry investigation. As a result, Petitioners, and all other persons similarly situated, may be subjected to searches and seizures, conducted at gunpoint, based upon no greater accumulation of information other than those persons had, in their possession, a firearm. It should further be noted that the mere possession of a firearm is neither violative of Oklahoma Law nor Woodward, Oklahoma City Ordinance.

Oklahoma statutes, Title 22 O.S. §186 defines an arrest as the ". . . taking of a person into custody, that he may be held to answer for a public offense". Further, Title 22 O.S. §190 defines the making of an arrest as:

> "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer."

Since this Court's decision in Terry v. Ohio, 392 U.S. 1 (1968), the Oklahoma Court of Criminal Appeals, in Castellano v. State, 585 P.2d 361 (Okl.Cr.1978) has distinguished an arrest from an investigatory detention, stating:

> "If an Officer is momentarily detaining a person in order to make an inquiry so as to determine his identity and obtain more information, it is in no way attempting to restrain him of his liberty or to take him into custody, then the stop does not constitute an arrest but, rather, is an investigatory detention. To constitute an arrest, there must be some actual restraint of the individual's freedom of movement, or attempt to take the person into custody."

Further, the Oklahoma Court of Criminal Appeals, in Burns v. State, 595 P.2d 108 (Okl.Cr.1979) found that an arrest occurred when a vehicle in which the defendants were driving was stopped and all persons therein were ordered out at gunpoint. The law in Oklahoma has been advanced to find that investigatory stops are not made at gunpoint. The court below has ruled in total conflict with the Oklahoma courts advising that it does not subscribe to the position that the use of a firearm in a reputed investigation turns the investigation into an arrest. Further, the finding of the court below ignores established Oklahoma Law concerning the times when a police officer may, without a warrant, place persons under arrest. In the present matter, as concerns the inquiry into probable cause, the officers could only arrest the Petitioners for a public offense committed in their presence of the officer, when

a felony had in fact been committed and the officer had reasonable cause for believing that the person arrested committed said felony; on a charge, made upon reasonable cause of the commission of a felony; or if the officer believed that the person arrested was operating a motor vehicle under the influence of some intoxicant.

In the matter presently sought for review, it is undisputed that the Respondents herein knew only that a passenger of the vehicle was reported as having a firearm. The Respondents were not advised as to the commission of any felony and, further, did not witness the commission of any misdemeanor prior to the time that they undertook the arrest of the Petitioners. Although such a report does, without argument, warrant an investigation by the officers, it does not raise to the standard of providing probable cause for the arrest, at gunpoint, of a mother and her child.

The Order from the court below is inconsistent with the analysis of the Eighth Circuit Court of Appeals in United States v. Seeyle, 815 F.2d 48 (8th Cir.1987) in that the Eighth Circuit derived a list of six (6) factors typically utilized in an analysis to determine if police have utilized the least intrusive means available to dispel suspicion of criminal activity. Even the most cursory review of the factors advanced by the Eighth Circuit clearly reveals that the method used by the Respondents herein was both unreasonable and highly intrusive. Despite the court below's finding to the contrary, the circumstances presented gives no reason for officers to suspect that the Petitioners had committed, were committing, or were contemplating the commission of a crime.

The court below relies upon this Court's decision in Adams v. Williams, 407 U.S. 143 (1972) as support for its conclusion

that a Terry stop was appropriate. It should be noted that this Court, in Adams, placed heavy reliance upon the fact that the police had been advised by an informant that the man who was stopped and searched, while seated in his car, was both in the possession of a firearm and in the possession of narcotics. Although it was not illegal under state law for the man to be carrying a weapon, the information concerning the carrying of narcotics was a report to the police officers that the man to be searched was involved in the commission of a felony. No similar nexis exists in the case presently sought for review. The Tenth Circuit Court of Appeals is attempting to expand the scope of Adams, supra, by allowing a Terry stop to occur when the only information given to police officers is the possession of a firearm. The classification of the Tenth Circuit Court of Appeals is, therefore, incorrect unless this Court is willing

to adopt a standard which approves brief inquiries made at gunpoint with the persons who are being interrogated laying spread eagle on an asphalt surface.

Further, in Adams, this Court stated:

> "In Terry this Court recognized that a 'Police Officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest' . . . a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the Officer at the time. . . . "

Once again, it is readily apparent that the Tenth Circuit Court of Appeals is seeking to expand both the ruling in Terry and the subsequent decision in Adams to increase the perimeter of "appropriate circumstances" and "appropriate manner" which allows maintaining the "status quo" at gunpoint.

CONCLUSION

The petition for writ of certiorari

should be granted.

Respectfully submitted,

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ATTORNEYS FOR THE
PETITIONERS

CERTIFICATE OF MAILING

This is to certify that on the 28th day of July, 1989 a true and correct copy of the above and foregoing instrument was mailed, postage prepaid thereon to:

Mr. Reggie N. Whitten
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Rodney C. Ramsey

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SHERYL MCGUIRE, individually and as mother and next friend of Mike McGuire, a minor,	)	(Filed May 4, 1989)
Plaintiffs-Appellants,	)	
v.	)	No. 87-2591
	)	(D.C. No. 85-2568-P)
THE CITY OF WOODWARD, OKLAHOMA, a municipal corporation; CLIFFORD HUNTER; JOSE SANCHEZ; DAVID CARRIGER; BRUCE STORM,	)	(W.D. Okla.)
Defendants-Appellees.	)	

ORDER AND JUDGMENT*

Before SEYMOUR, BARRETT, and BALDOCK,

Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Plaintiffs-appellants appeal the district court's order granting summary judgment in favor of defendants in the underlying civil rights action brought pursuant to 42 U.S.C. §1983. Plaintiffs contended in their amended complaint that defendants Carriger, Sanchez, and Hunter, police officers with the City of Woodward, subjected plaintiffs to an unlawful arrest, search and seizure, as well as verbal, emotional and physical harassment and abuse. Plaintiffs further contended that the officers' actions were taken pursuant to unconstitutional policies and customs established by defendant City of Woodward, through the chief of police, defendant Storm.

We have considered the briefs on appeal and reviewed the record in the light most favorable to plaintiffs. See Ewing v. Amoco Oil Co., 823 F.2d 1432, 1437 (10th Cir.1987). For the reasons set out below,

we conclude that the district court properly granted summary judgment in favor of defendants.

In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court considered "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest," id. at 15, and answered in the negative. The Court stated that the reasonableness of the particular search or seizure must be assessed in light of the particular circumstances and that "the facts must be adjudged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution' in the belief that the action taken was appropriate?" Id. at 21-22. The Court further held that the officer "in justifying the particular intrusion . . . must be able to point to specific and articulable facts

which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Id. at 21. Not only must the officer's action in making the stop be justified at its inception, but "it must be reasonably related in scope to the circumstances which justified the interference in the first place." Id. at 20.

In our view, the following specific and articulable facts within the collective knowledge of the defendant officers, see United States v. Merritt, 695 F.2d 1263, 1268 (10th Cir. 1982), cert. denied, 461 U.S. 916 (1983), together with the rational inferences therefrom, reasonably warranted the officers' stop of plaintiffs:

1. The police received a report that a man was in front of a store in a shopping center with a gun, and were requested to send a police officer;

2. When an officer arrived at the scene, a man came running out of the store, upset and frightened, and pointed at a car leaving the parking lot, saying, "There goes the man with the gun";

3. The subject car was leaving the parking lot and entering a state highway; and

4. When the officer followed the car, it changed lanes several times to avoid the police car behind it.

Although, as plaintiffs point out, it was not illegal under state law or city ordinance at the time of this incident to possess a firearm, the circumstances presented here gave the officers reason to suspect that plaintiffs had committed, were committing, or were going to commit a crime. See Adams v. Williams, 407 U.S. 143 (1972) (stop and search of man seated in car, reported by informant to be carrying narcotics and gun at his waist, upheld

even though not illegal under state law for man to be carrying a weapon, concealed or otherwise). Therefore, a Terry stop was appropriate.

Plaintiffs argue that the officers acted unreasonably in ordering plaintiffs from their car with guns drawn, and in requiring plaintiffs to lie prone upon the ground in order to search them for weapons. We must thus consider whether the officers' actions were "reasonably related in scope to the circumstances which justified the interference in the first place." Terry, 392 U.S. at 20. In holding in Terry that the officer's search for weapons upon stopping the petitioner was not unreasonable under the fourth amendment, id. at 31, the Court said it believed, under the circumstances, that "a reasonably prudent man would have been warranted in believing petitioner was armed and thus

presented a threat to the officer's safety while he was investigating his suspicious behavior." Id. at 23. The same can certainly be said of the circumstances here.

In United States v. Merritt, 695 F.2d at 1272, we held that the officers' actions in ordering the defendants from their vehicle with guns not only drawn, but trained on the defendants, was reasonable in light of all the pertinent information known to the police at the time of the stop. Id. at 1273. As we noted, "the law is settled that the police may, in connection with an investigatory stop, order an individual out of his vehicle." Id. Furthermore, we disagreed with those courts who, like plaintiffs here, "have taken the view that the use of guns automatically turns the stop into an arrest . . . " Id. We held, instead, that "the

use of guns in connection with a stop is permissible where the police reasonably believe they are necessary for their protection" Id. Mr. Johnson, the plaintiffs' expert witness on police procedures, testified in his deposition that the information known to the defendant officers was enough to make the stop a "high-risk stop." Consequently, it was reasonable for the officers here to believe that the use of guns in connection with the stop was necessary for their protection.

Mr. Johnson further testified that an officer making a stop has several options regarding search methods. He can make a cursory pat-down of the suspects, or he can search them using one of the three Roth methods suitable for high-risk stops: with the suspects freestanding, with them braced against the wall, or with them prone upon the ground. Mr. Johnson testified that which method an officer uses is entirely

a judgment call. Based upon the circumstances here, we agree with the district court that the officers did not act unreasonably in choosing to use the prone method.

As the Corut stated in Terry:

> [W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

392 U.S. at 24.

Given the conclusion that no underlying constitutional violation occurred, we need not address the issues of qualified immunity or municipal and supervisory liability. The judgment of the United States District Court for the Western District

of Oklahoma is AFFIRMED.

ENTERED FOR THE
COURT PER CURIAM

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHERYL McGUIRE, Individually and as mother and next friend of MIKE McGUIRE, a minor,	)	Filed October 5, 1987
Plaintiffs,	)	
vs.	)	CIV-85-2568-P
CITY OF WOODWARD, OKLAHOMA, a municipal corporation; CLIFFORD HUNTER; JOSE SANCHEZ; DAVID CARRIGER; and BRUCE STORM,	)	
Defendants.	)	

ORDER

Before this Court for consideration is a Motion for Summary Judgment filed by defendants City of Woodward, Oklahoma, Woodward police officers Clifford Hunter, Jose Sanchez, David Carriger, and Woodward Police Chief Bruce Storm. Counsel for the parties argued the Motion before this Court on August 14 and August 20, 1987, and submitted supplemental briefs thereafter. Defendants contend there is no

substantial controversy as to any material fact and therefore the case is ripe for summary adjudication. Plaintiffs have responded in opposition.

The facts presented to the Court upon a Motion for Summary Judgment must be construed in a light most favorable to the nonmoving party. Board of Education v. Pico, 457 U.S. 853, 863 (1982); United States v. Diebold, Inc., 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. The Court is precluded from granting summary judgment where there is genuine dispute as to a fact which is material, that is a fact which is relevant under the applicable substantive law. Anderson v. Liberty Lobby, ___ U.S. ___, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). Only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude

the entry of summary judgment. Id. Finally, the movant must show entitlement to judgment as a matter of law. Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985).

This case arises out of a police stop involving the plaintiffs and officers Hunter, Sanchez and Carriger of the Woodward Police Department. The stop was precipitated by a phone call from the manager of a C.R. Anthony store reporting a man in the parking lot with a gun. The Woodward police dispatcher who received the call notified Officer Carriger who proceeded to Anthony's. There he met a "upset and frightened" manager who pointed to a car exiting the parking lot and informed him that this was the vehicle carrying the man with the gun.

This vehicle was being driven by plaintiff Cheryl McGuire. Her son, plaintiff Mike McGuire, was the passenger. The McGuires

were leaving after shopping at Anthony's and other stores in the center. Mike McGuire had purchased a cassette tape and was sitting in the car listening to it before their departure. While doing so, he held a Crossman 357 pellet gun to his face in plain view to customers. Specifically, the gun, which undeniably bears a strong resemblance to a 357 Magnum, was observed by at least two women entering Anthony's, who became concerned and reported their fears to the store manager. He then made the report to the police.

Officer Carriger, joined by officers Hunter and Sanchez, stopped the plaintiffs' vehicle, ordered them out of the car with their hands up and told them to walk to the back of the vehicle. The officers had their weapons drawn, and placed the McGuires on the ground while they conducted a search for weapons. Once the officers discovered the gun in question was a pellet

gun, the plaintiffs were released. Following a short discussion of what had just transpired, they left.

Plaintiffs contend the actions of these police officers deprived them of their 4th, 5th, and 14th amendment rights under the Constitution of the United States in that they were subjected to an illegal search and seizure, subjected to the use of excessive force, and deprived of their liberty without due process. Specifically, plaintiffs allege the officers knowingly and willfully violated their rights when they ordered the McGuires from their car at gunpoint and caused them to "prone out" on the roadway. Plaintiffs further contend this deprivation was pursuant to a policy or custom of the defendant City of Woodward and that the officers involved were inadequately supervised and trained by defendant Bruce Storm, the Woodward Chief of Police.

Defendants deny the plaintiffs were deprived of any civil rights and further deny the existence of any policy, custom or procedure of violating such rights. Defendants City of Woodward and Storm contend the officers were properly supervised, trained and instructed. Defendants Hunter, Sanchez and Carriger contend that plaintiffs were stopped in a justifiable manner and with proper cause. They argue that at all times they acted in accordance with generally recognized and accepted principles of police conduct, in good faith, and never in violation of any established statutory or constitutional rights of the plaintiffs.

Plaintiffs bring this action pursuant to the Civil Rights Act and the 4th, 5th, and 14th amendments to the Constitution of the United States. The Civil Rights Act does not, standing alone, create any civil rights of citizens; rather, it provides a remedy for rights guaranteed by the

Constitution or laws of the United States. Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981). Plaintiffs seek to establish these rights by virtue of the aforementioned amendments. However, they have done no more than state defendants acted in violation of the 5th Amendment, and have made no showing of federal involvement. See Dockstader v. Miller, 719 F.2d 327, 332 (10th Cir. 1983), cert denied. 476 U.S. 1256 (1984). In fact, plaintiffs' counsel conceded at oral argument on August 20 that they did not have a viable 5th Amendment claim. Therefore, the Corut only addresses the alleged 4th and 14th amendment claims.

I. Officers Hunter, Sanchez and Carriger

To establish individual liability under Section 1983, plaintiffs must make a prima facie showing of two elements: (1) that the act or omission deprived plaintiffs of a right, privilege or immunity

secured by the Constitution or laws of the United States, and (2) that the act or omission was done by persons acting under color of law. Parratt v. Taylor, 451 U.S. 527, 535 (1981); Norton v. Rudell, 620 F.2d 1375, 1378-79 (10th Cir. 1980). Defendants Hunter, Sanchez and Carriger admit that their actions were taken under color of law, but they deny they deprived the plaintiffs of any constitutional rights. Additionally, they affirmatively assert the defense of qualified immunity.

The bounds of qualified immunity have received sustained attention from the Supreme Court in recent years, as it seeks to strike a balance between the "interests and vindication of citizens' rights and in public officials' effective performance of their duties." Davis v. Scherer, 468 U.S. 183, 195 (1984). Generally, government officials performing discretionary functions have

been provided with qualified immunity so long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See Anderson v. Creighton, 107 U.S. 3034, 3038 (1987) (and cases cited therein). The cornerstone of qualified immunity is the "objective legal reasonableness" of the officers' actions "assessed in light of clearly established law" at that time. Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982). However, in its most recent mandate on the subject, the United States Supreme Court has made it clear that the test of "clearly established law" is not couched in terms of generalities, but must be directly identified. Justice Scalia, writing for the majority in Anderson v. Creighton, 107 U.S. 3034 (1987) described it as such:

> . . . [O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more

> relevant, since: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness must be apparent.

Id. at 3039 (citations omitted).

In Anderson, the Supreme Court vacated a Court of Appeals judgment denying qualified immunity to an FBI agent who conducted a warrantless search at the plaintiff's residence pursuant to a belief that a suspected bank robber might be found there. The Court of Appeals found summary judgment on qualified immunity grounds improper because the right of persons to be protected from warrantless searches absent probable cause and exigent circumstances was clearly established. The Supreme Court, however, held the agent was entitled to qualified immunity if he could establish as a matter

of law that a reasonable officer could have believed the search comported with the 4th Amendment, even though it actually did not. Noting that law enforcement officials should have the same protection as other officials who reasonably, but mistakenly, believe their acts to be lawful, the Court found the agent should not be held personally liable. Id.

In this case, it is uncontroverted that two women reported to the Anthony's manager that a man was in the parking lot waving a gun, that the manager called teh Woodward Police and reported a man in the parking lot with a gun, and that the manager was "upset and frightened" when he met Officer Carriger and identified plaintiff's vehicle as containing the man with the gun. Under these admitted facts, the Court finds the "collective knowledge" of the officers was such that they could reasonably believe they had authority to lawfully

stop the plaintiffs' vehicle, order them from the car, and have them lie on the pavement while searching them.

Plaintiffs argue the officers can not justify drawing their weapons and ordering plaintiffs to lie down on the pavement while being searched. Yet the actions taken by these officers have been taken in other instances as well, and such actions have been approved by the various appellate courts of this country. See e.g. Karr v. Smith, 774 F.2d 1029 (10th Cir. 1985) (officers may rely on information provided by ordinary citizens); United States v. Merritt, 695 F.2d 1263 (10th Cir 1982) (officers may draw and point their weapons where there is a reasonable apprehension that their lives may be in danger during the course of an investigatory stop); United States v. Jacobs, 715 F.2d 1343 (9th Cir. 1983) (suspects may be ordered to "prone out").

Viewing the facts in this case in a light most favorable to the plaintiffs, the Court finds the plaintiffs have not been deprived of any Constitutional guarantees. However, even if there has been a violation of civil rights giving rise to a 1983 action, it does not withstand a motion for summary judgment by the individual officers asserting qualified immunity. Anderson dictates that they are protected from civil liability so long as a reasonable officer confronted with the same scenario could have believed the stop and search of plaintiffs was lawful in light of clearly established law and the information the officers possessed. See Id. at 3040. Here, the Court finds as a matter of law that in light of established law and the information these defendants possessed a reasonable officer would view the stop and search lawful.

As the Anderson Court noted, it is

inevitable that law enforcement officials will in some cases reasonably, but mistakenly, conclude that their actions are lawful when in fact they are not. While this Court does not address in detail its conclusion that there was no constitutional violation, it is confident that even if it is wrong on this issue, a reasonable officer could have believed such actions to be lawful. Having determined such, the Court finds officers Hunter, Sanchez and Carriger are entitled to summary jdugment and are therefore immune from personal liability.

II. Defendant Storm and the City of Woodward

Although plaintiffs have failed to show defendants Hunter, Sanchez and Carriger deprived them of a Constitutional right, defendant Storm and/or the City of Woodward might still be liable if an improper policy had been adopted. See Wellington v. Davis,

717 F.2d 932, n.6 (4th Cir. 1983); But see Boren v. City of Colorado Springs, 624 F.Supp. 474, 479 (D.Colo. 1985). The City of Woodward will only be responsible for Storm's action if he possesses authority for establishing final police policy with respect to the activity in question. Pembaur v. Cincinnati, 475 U.S. 469, ___, 106 S.Ct. 1292, 1299 (1986). Storm's individual liability generally turns on the same requirements as municipal liability, but the deprivation need not be due to policy or custom. See McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979).

The Complaint in this action alleges that in his capacity as chief of police, Storm is responsible for administering the police department of the City of Woodward, and for the initial and continued training of all members of the police department. Storm had admitted that he is responsible

for establishing policy relating to the Woodward Police Handbook. Therefore, the Court proceeds as if Storm's decisions in this area would represent municipal policy which could give rise to municipal liability. Pembaur v. Cincinnati, 475 U.S. 469, ___ n.12, 106 S.Ct. 1292, 1300 n.12 (1986).

Plaintiffs seek to impose liability in this case by asserting Storm failed to adequately adopt policies governing the Woodward Police Department and failed to supervise and train his officers. While a "policy of omission" theory has sometimes been argued successfully, it is clearly not susceptible to easy proof. See Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) (and cases cited therein); City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). This is so because "policy" generally implies a course of

action consciously chosen from among various alternatives by the official responsible for adopting final policy. Tuttle, 471 U.S. at 823. If policy cannot be articulated but is alleged to be reflected in a "but for" sense, it is doubtful the plaintiff can state a cause of action under §1983. See Pembaur v. Cincinnati, 475 U.S. 469 ___ n.11, 106 S.Ct. 1292, 1299 n.11 (1986) (discussing the plurality and concurring opinions in Oklahoma City v. Tuttle). In this case, as plaintiffs' counsel acknowledged at oral argument, the "policy" of the City of Woodward is not a course of action consciously chosen from various alternatives. Rather, plaintiffs have simply alleged that the incident in question would not have occurred "but for" the absence of adequate policies.

A pattern of police misconduct is necessary to impose §1983 liability for failure to supervise. See Avery v. Burke

County, 660 F.2d 114 (4th Cir. 1981). There must be some evidence of prior similar instances where citizens were injured or endangered by police behavior to impute knowledge to supervisory personnel of municipality inadequacies. See Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983). cert. denied, 467 U.S. 1215 (1984). Only then could the municipality's omissions constitute "tacit authorization of" or "deliberate indifference" to Constitutional injuries. Avery, 660 F.2d at 114.

Where a Constitutional violation is not alleged to be part of a pattern of past misconduct, a supervisory official or municipality may be held liable only where there is essentially a complete failure to train the police force, or where training is so reckless or grossly negligent that future misconduct is almost inevitable. Hays v. Jefferson County, Kentucky, 668 F.2d 869, 874 (6th Cir. 1982)

cert. denied, 459 U.S. 833 (1982). In fact, it is not entirely clear that gross negligence in training meets the test, for as Justice Rehnquist, writing for the plurality in Oklahoma City v. Tuttle, stated:

> We express no opinion on whether a policy that itself is not unconstitutional, such as the general 'inadequate training' alleged here, can ever meet the 'policy' of Monell. In addition, even assuming that such a 'policy' would suffice, it is open to question whether a policymaker's 'gross negligence' in establishing police training practices could establish a 'policy' that constitutes a 'moving force' behind subsequent unconstitutional conduct, or whether a more conscious decision on the part of the policymaker would be required. 471 U.S. 808, 824 n.7 (1985).

See also Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985) cert. denied, 107 S.Ct. 1369 (1987) (it is doubtful that a finding of gross negligence in training will always be a ticket to municipal liability). Courts do agree,

however, that there must be more than negligence, and the burden is on the plaintiff to prove.

In the present action, there is no allegation the alleged constitutional violation is but one example of a series of abuses. Rather, plaintiffs' counsel conceded at the August 14 hearing on all pending motions that plaintiff has no evidence of constitutional violations involving stops by Woodward officers in the recent past or any knowledge of injury due to such stops. In fact, plaintiffs' total submission supporting their claim against the City of Woodward consists of the deposition of Dan Johnson, who opines that Storm's failure to promulgate policies to adequately supervise and train his deputies was a negligent act.

The policies underlying Rule 56 do not require that a Court deny summary judgment whenever a party produces an expert

to support his or her position. See Merit Motors, Inc. v. Chrysler Corporation, 569 F.2d 666 (D.C. Cir. 1977). In this case, defendants have presented evidence that each member of the Woodward Police Department has received standard police academy training which includes instruction on stopping vehicles and searching its occupants in high-risk situations. Plaintiffs have failed to raise an issue as to whether this training is grossly inadequate, if indeed such a showing would allow recovery. Admittedly, plaintiffs cannot show a conscious choice to pursue an inadequate policy, but rely on the "but for" theory which this Court has rejected in the past. See e.g. Hintergardt v. City of Oklahoma, CIV-85-2266-W (Nov. 26th, 1985) (plaintiff failed to allege what special duty defendant had to train its officers with regard to high-speed chases), See also Cook v. Allen,

CIV-86-2505-P (August 17, 1987). Thus, summary judgment for City of Woodward is GRANTED.

Finally, to recover from defendant Storm individually, plaintiff must show that he breached a duty to plaintiff which was the proximate cause of the injury. See McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979). In essence there must be an "affirmative link" between the misconduct complained of an the actions of the defendant. Rizzo v. Goode, 423 U.S. 362 (1976). This requires that the superior either participate or acquiesce in a constitutional deprivation, or fail to perform a required duty. Kite v. Kelly, 546 F.2d 334, 337-38 (10th Cir. 1976); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). If the defendant is in a position of responsibility, knew, or should haveknown, of the misconduct, and yet failed to prevent future harm, a cause of action for breach

of duty would be stated.

The uncontroverted facts show that defendant Storm did not participate in any way in the stop and search of plaintiffs, nor did he acquiesce in the individual officers' conduct as discussed previously. Under these facts, viewed in the light most favorable to the plaintiffs, the Court has no trouble finding a lack of causation between defendant Storm's actions and the alleged constitutional violations. Therefore, summary judgment for defendant Storm individually is appropriate.

Accordingly, having found dispositively the individual officers are entitled to qualified immunity and that there are no triable issues of fact as to the City of Woodward and Bruce Storm, summary judgment for all defendants is hereby granted.

IT IS SO ORDERED.

/s/ Layn R. Phillips
United States District Judge